

## Federal Trade Commission

## § 801.50

(iii) At least one other acquiring person has annual net sales or total assets of \$10 million (as adjusted) or more; or

(2)(i) The acquiring person has annual net sales or total assets of \$10 million (as adjusted) or more;

(ii) The joint venture or other corporation will have total assets of \$100 million (as adjusted) or more; and

(iii) At least one other acquiring person has annual net sales or total assets of \$10 million (as adjusted) or more.

(d) For purposes of paragraphs (b) and (c) of this section and determining whether any exemptions provided by the act and these rules apply to its formation, the assets of the joint venture or other corporation shall include:

(1) All assets which any person contributing to the formation of the joint venture or other corporation has agreed to transfer or for which agreements have been secured for the joint venture or other corporation to obtain at any time, whether or not such person is subject to the requirements of the act; and

(2) Any amount of credit or any obligations of the joint venture or other corporation which any person contributing to the formation has agreed to extend or guarantee, at any time.

(e) The commerce criterion of Section 7A(a)(1) is satisfied if either the activities of any acquiring person are in or affect commerce, or the person filing notification should reasonably believe that the activities of the joint venture or other corporation will be in or will affect commerce.

*Examples:* 1. Persons "A," "B," and "C" agree to create new corporation "N," a joint venture. "A," "B," and "C" will each hold one third of the shares of "N." "A" has more than \$100 million (as adjusted) in annual net sales. "B" has more than \$10 million (as adjusted) in total assets but less than \$100 million (as adjusted) in annual net sales and total assets. Both "C's" total assets and its annual net sales are less than \$10 million (as adjusted). "A," "B," and "C" are each engaged in commerce. "A," "B," and "C" have agreed to make an aggregate initial contribution to the new entity of \$18 million in assets and each to make additional contributions of \$21 million in each of the next three years. Under paragraph (d) of this section, the assets of the new corporation are \$207 million. Under paragraph (c) of this section, "A" and "B" must file notification. Note that "A" and "B" also meet the criterion of Section

7A(a)(2)(B)(i) since they will be acquiring one third of the voting securities of the new entity for in excess of \$50 million (as adjusted). N need not file notification; see § 802.41.

2. In the preceding example "A" has over \$10 million (as adjusted) but less than \$100 million (as adjusted) in sales and assets, "B" and "C" have less than \$10 million (as adjusted) in sales and assets. "N" has total assets of \$500 million. Assume that "A" will acquire 50 percent of the voting securities of "N" and "B" and "C" will each acquire 25 percent. Since "A" will acquire in excess of \$200 million (as adjusted) in voting securities of "N", the size-of-person test in § 801.40(c) is inapplicable and "A" is required to file notification.

[43 FR 33537, July 31, 1978, as amended at 48 FR 34434, July 29, 1983; 52 FR 7082, Mar. 6, 1987; 66 FR 8690, Feb. 1, 2001; 70 FR 4992, Jan. 31, 2005]

### § 801.50 Formation of unincorporated entities.

(a) In the formation of an unincorporated entity (other than in connection with a consolidation), even though the persons contributing to the formation of the unincorporated entity and the unincorporated entity itself may, in the formation transaction, be both acquiring and acquired persons within the meaning of § 801.2, the contributors shall be deemed acquiring persons only and the unincorporated entity shall be deemed the acquired person only.

(b) Unless exempted by the Act or any of these rules, upon the formation of an unincorporated entity, in a transaction meeting the criteria of Section 7A(a)(1) and 7A(a)(2)(A) (other than in connection with a consolidation), a person is subject to the requirements of the Act if it acquires control of the newly-formed entity. Unless exempted by the Act or any of these rules, upon the formation of an unincorporated entity, in a transaction meeting the criteria of Section 7A(a)(1), the criteria of Section 7A(a)(2)(B)(i) (other than in connection with a consolidation), a person is subject to the requirements of the Act if:

(1)(i) The acquiring person has annual net sales or total assets of \$100 million (as adjusted) or more;

(ii) The newly-formed entity has total assets of \$10 million (as adjusted) or more; and

(iii) The acquiring person acquires control of the newly-formed entity; or

(2)(i) The acquiring person has annual net sales or total assets of \$10 million (as adjusted) or more;

(ii) The newly-formed entity has total assets of \$100 million (as adjusted) or more; and

(iii) The acquiring person acquires control of the newly-formed entity.

(c) For purposes of paragraph (b) of this section, the total assets of the newly-formed entity is determined in accordance with § 801.40(d).

(d) Any person acquiring control of the newly-formed entity determines the value of its acquisition in accordance with § 801.10(d).

(e) The commerce criterion of Section 7A(a)(1) is satisfied if either the Activities of any acquiring person are in or affect commerce, or the person filing notification should reasonably believe that the Activities of the newly-formed entity will be in or will affect commerce.

*Example:* A and B form a new partnership (LP) in which each will acquire a 50 percent interest. A contributes a plant valued at \$250 million and \$100 million in cash. B contributes \$350 million in cash. Because each is acquiring non-corporate interests, valued in excess of \$50 million (as adjusted) which confer control of LP both A and B are acquiring persons in the formation. Each must now determine if the exemption in § 802.4 is applicable to their acquisitions of non-corporate interests in LP. For A, LP's exempt assets consist of all of the cash contributed by A and B (pursuant to § 801.21) and A's contribution of the plant (pursuant to § 802.30(c)). Because all of the assets of LP are exempt with regard to A, A's acquisition of non-corporate interests in LP is exempt under § 802.4. For B, LP's exempt assets include only the cash contributions by A and B. The plant contributed by A, valued at \$250 million is not exempt under § 802.30(c) with regard to B. Because LP has non-exempt assets in excess of \$50 million (as adjusted) with regard to B, B's acquisition of non-corporate interests in LP is not exempt under § 802.4. B must now value its acquisition of non-corporate interests pursuant to § 801.10(d) and because the value of the non-corporate interests is the same as B's contribution to the formation (\$350 million), the value exceeds \$200 million (as adjusted) and B must file notification prior to acquiring non-corporate interests in LP. See additional examples following §§ 802.30(c) and 802.4.

[70 FR 11512, Mar. 8, 2005]

### § 801.90 Transactions or devices for avoidance.

Any transaction(s) or other device(s) entered into or employed for the purpose of avoiding the obligation to comply with the requirements of the act shall be disregarded, and the obligation to comply shall be determined by applying the act and these rules to the substance of the transaction.

*Examples:* 1. Suppose corporations A and B wish to form a joint venture. A and B contemplate a total investment of over \$100 million (as adjusted) in the joint venture; persons "A" and "B" each have total assets in excess of \$100 million (as adjusted). Instead of filing notification pursuant to § 801.40, A creates a new subsidiary, A1, which issues half of its authorized shares to A. Assume that A1 has total assets of \$3000. "A" then sells 50 percent of its A1 stock to "B" for \$1500. Thereafter, "A" and "B" each contribute in excess of \$50 million (as adjusted) to A1 in exchange for the remaining authorized A1 stock (one-fourth each to "A" and "B"). A's creation of A1 was exempt under Sec. 802.30; its \$1500 sale of A1 stock to "B" did not meet the size-of-transaction filing threshold in Section 7A(a)(2)(B); and the second acquisition of stock in A1 by "A" and "B" was exempt under § 802.30 and Sections 7A(c)(3) and (10). Since this scheme appears to be for the purpose of avoiding the requirements of the act, the sequence of transactions will be disregarded. The transactions will be viewed as the formation of a joint venture corporation by "A" and "B" having over \$10 million (as adjusted) in assets. Such a transaction would be covered by § 801.40 and "A" and "B" must file notification and observe the waiting period.

2. Suppose "A" wholly owns and operates a chain of twenty retail hardware stores, each of which is separately incorporated and has assets of less than \$10 million. The aggregate fair market value of the assets of the twenty store corporations is in excess of \$50 million (as adjusted). "A" proposes to sell the stores to "B" for in excess of \$50 million (as adjusted). For various reasons it is decided that "B" will buy the stock of each of the store corporations from "A." Instead of filing notification and observing the waiting period as contemplated by the act, "A" and "B" enter into a series of five stock purchase-sale agreements for \$12 million each. Under the terms of each contract, the stock of four stores will pass from "A" to "B". The five agreements are to be consummated on five successive days. Because after each of these transactions the store corporations are no longer part of the acquired person (§ 801.13(a) does not apply because control has passed, see § 801.2), and because \$12 million is below the size-of-transaction filing threshold of